

Service Date: June 5, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF The Petition of)	UTILITY DIVISION
AT&T Communications of the Mountain)	
States, Inc. Pursuant to 47 U.S.C. Section)	DOCKET NO. D96.11.200
252(b) for Arbitration of Rates, Terms,)	
and Conditions of Interconnection With)	ORDER NO. 5961e
U S WEST Communications, Inc.)	

* * * * *

SECOND ORDER ON RECONSIDERATION

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SECOND ORDER ON RECONSIDERATION

INTRODUCTION

This proceeding began when AT&T Communications of the Mountain States, Inc. (AT&T) requested arbitration by the Montana Public Service Commission (Commission) of numerous unresolved issues in their negotiations for interconnection pursuant to 47 U.S.C. § 252(b). The Commission held an arbitration hearing in February 1997 and issued its first Arbitration Order, Order no. 5961b, on March 20, 1997.

Both parties requested reconsideration of Order No. 5961b. The Commission issued its Order on Reconsideration, Order No. 5961c, on July 9, 1997. Order No. 5961c directed the parties to file a single agreement incorporating the decisions from both orders within 45 days of service of the Order on Reconsideration.

On July 18, 1997, the United States Court of Appeals for the Eighth Circuit issued its decision in Iowa Utils. Bd., et al. v. FCC, 120 F.3d 793, (8th Cir., 1997), *amended on reh'g*, 135 F.3d 535 (Oct. 14, 1997), *cert. granted, sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 683 (1998). Although this opinion affected certain portions of the Commission's arbitration and reconsideration orders, the parties filed a single agreement on September 4, 1997 as directed by the Commission. The agreement was unsigned, however, and included numerous provisions where both parties' positions were set forth as still unresolved. The parties requested Commission review of these additional issues that were either raised as a result of the Court's opinion, or resurfaced as they attempted to incorporate the Commission's arbitration decisions into their contract.

At the request of AT&T, Commission staff informally met with representatives from U S WEST and AT&T for further explanation of the disputed issues. On October 14, 1997, the Eighth Circuit issued an order on rehearing petitions which directly related to the unresolved

issue concerning network element combinations. The parties filed additional briefs addressing the effect of the October 14th order on the network element combination issues still pending before the Commission.

On April 21, 1998, the Commission issued the Order on Supplemental Disputed Issues, Order No. 5961d, which resolved the remaining disputed issues. Both parties filed motions for reconsideration of this order on May 18, 1998. Additionally, U S WEST's petition requested rehearing as an alternative with regard to one of the issues. Both parties ask the Commission to resolve a branding issue which was not resolved in the Supplemental Order but had been briefed by them. As explained below we deny reconsideration of all issues, except the branding and construction issues, which are resolved as discussed herein.

COMMISSION DECISION

Issue No. A-1: Combination of Elements:

1. Both parties request reconsideration of the Commission's decision regarding combinations of unbundled network elements (UNEs). A brief summary of their arguments is that (1) U S WEST objects to being required to provide combinations even though it will be compensated for doing so through the rebundling charge; and (2) AT&T is satisfied with the decision to require combinations, but dissatisfied that it has to pay the rebundling charge which it claims is not cost-based.

2. The Supplemental Order resolved the issues concerning access to unbundled elements and unbundling of combinations as follows:

U S WEST is unwilling to allow CLECs access to its network in any manner except by collocating equipment, which the Court expressly stated CLECs are not required to do. U S WEST's proposed contract terms would require AT&T to recombine elements that [U S WEST] has chosen to unbundle without permitting AT&T access to the elements to recombine them. It has taken the Eighth Circuit rulings to an illogical extreme. U S WEST cannot have it both ways--either it

permits CLECs to purchase combined elements or it permits access to its network so that CLECs can perform the combinations, without requiring collocation.

3. U S WEST argues that the idea that U S WEST must provide elements in combination to AT&T is based on "the mistaken premise that U S WEST has not offered access to its network elements." U S WEST maintains that its proposed contract language would provide CLECs with adequate access to its network for them to combine UNEs without owning or controlling equipment. Therefore, according to U S WEST, the Commission has no basis for ordering combinations because AT&T has access to UNEs even without collocation.

4. U S WEST first mentioned this Single Point of Termination (SPOT) frame access in its Supplemental Memorandum Regarding the Effect of the Eighth Circuit's Decision on Rehearing filed on December 17, 1998. The Commission cannot consider evidence that has not been formally presented and made subject to discovery and cross-examination. The record in this Docket contains no information about it and we will not reopen the record consider it now.

5. U S WEST argues that, unless the Commission reconsiders this now, AT&T will have no obligation or incentive to agree to any terms and conditions proposed by U S WEST that would require AT&T to combine network elements. Thus, AT&T can ensure that it receives combinations by failing to reach any agreement regarding access.

6. The Commission addressed compliance with the 1996 Act in Order No. 5961d, stating that the only way its decision could comply with the Act was to require U S WEST to offer combinations. The Order addressed the dilemma presented in the only way possible, which is to require U S WEST to provide combinations until such time as the parties negotiate terms for AT&T's access to U S WEST's network. If circumstances change, the parties can amend their interconnection agreement. If AT&T is unwilling to negotiate, as U S WEST asserts it will be, then U S WEST can request arbitration.

7. If U S WEST's SPOT frame proposal is a workable solution, the details of such access can be worked out by the parties--with arbitration if necessary. The Commission relied on state law to issue its decision on the combination issue, and U S WEST has not made a convincing argument that state law does not permit the Commission's decision. It does argue that the CLEC must bear the costs associated with entry using UNEs. We agree with that argument and our Order addresses that by requiring the rebundling charge.

8. Further, the unspoken indirect holding of the Eighth Circuit order is that U S WEST cannot refuse AT&T access. The only way to resolve the present dilemma is to require U S WEST to provide the platform. Although the dispute over combinations mandates this result, the dispute over shared transport, discussed below, does not. With shared transport, there is no correlative compelling reason to disallow shared transport. With combinations, the Court reasoned that RBOCs would allow open access. U S WEST's refusal to allow access--and its last minute SPOT frame proposal--put this Commission in a quandary.

9. U S WEST contends that a CLEC who chooses to enter the market by purchasing UNEs must bear the costs of that entry strategy. The Commission's orders do require AT&T to bear the cost of combining UNES. Until U S WEST begins to provide unbundled elements in a manner that allows AT&T to combine them, this is accomplished with the rebundling charge which U S WEST requested.

10. AT&T argues that although the Act requires that CLECs gain nondiscriminatory access to UNEs at cost-based rates, the rebundling charge is not cost-based. AT&T states that the Eighth Circuit did not anticipate that ILECs would seek to hinder CLEC entry through onerous requirements that CLECs use collocation and their own facilities to combine UNEs. It further argues that U S WEST's refusal to allow nondiscriminatory access to UNEs cannot also

mean that CLECs lose their statutory right to obtain UNEs at cost-based rates, which is what the Commission requires. AT&T claims that the effect of the Commission's decision is to make AT&T pay the price for U S WEST's illegal and anticompetitive conduct.

11. The Commission recognizes that the Act allows CLECs to obtain UNEs at cost-based rates. This statutory requirement squares with the Eighth Circuit's opinions which apply to circumstances where the ILEC permits CLECs a means to access their network to combine elements. However, we cannot agree that a CLEC should be able to obtain combined elements at cost-based rates. In these circumstances, the CLEC will avoid all costs of combining elements if the ILEC is precluded from imposing an additional charge. The Eighth Circuit did not foresee the situation we are confronted with here; in this instance, we concluded that the Court's orders preclude AT&T from obtaining UNEs at cost-based rates where AT&T is not combining elements itself. We further concluded that the unbundling charge ensures that AT&T will not acquire UNEs at cost-based rates. We added, "Requiring U S WEST to provide UNE combinations only if paid a rebundling charge by the CLEC is not inconsistent with the Eighth circuit's opinion."

12. The Commission's last order does not require that this situation continue indefinitely. Rather, it encourages the parties to resolve the network access problem. The Commission has also stated that it will open a proceeding to address permanent rates; the rebundling charge can also be addressed in that proceeding if there is a need for it to continue.

13. U S WEST requested that the Commission reopen the record to consider additional evidence concerning U S WEST's SPOT frame proposal. U S WEST's SPOT frame proposal may in fact be an adequate resolution to the problem of permitting CLEC access to U S WEST's network without their having to collocate equipment. Although the Commission could

reopen the record here to consider additional evidence, that would be an inefficient use of Commission resources. The SPOT frame proposal is being considered in D97.5.87, the § 271 proceeding in which the Commission will consider whether U S WEST has met the requirements for entry in the interLATA long distance market. It should not be considered here as well. Moreover, U S WEST argued previously that an additional hearing before the Commission was neither necessary nor appropriate "insofar as the parties' arbitration concluded [in early 1997]."¹

14. If the Commission determines in Docket No. D97.5.87 that the SPOT frame provides satisfactory access to UNEs, U S WEST may amend its interconnection agreement with AT&T to provide for AT&T access in that manner and to delete the language requiring combinations of UNEs.

Issue No. A-5 and Issue No. 3-5: Limitation of Liability (Issue No. A-5); and Performance Standards (Issue No. 3-5):

15. Order No. 5961d did not adopt AT&T's proposed language which would permit the Commission, an arbitrator, or other decision maker to award consequential damages if such decision maker determines that a "pattern of conduct" justifies them. AT&T had argued that U S WEST could evade its obligations under the Act by "engaging in a pattern of seemingly *de minimus* contract breaches which, when taken together, constitute a serious impairment of rights."

¹See letter dated September 3, 1997, to Commissioners of the Montana Public Service Commission from Barry Medintz on behalf of U S WEST.

16. AT&T's petition states that the parties agreed to withdraw AT&T's proposed language for Attachment 3, Section 18.2 and replace it with a provision agreed to for the State of Idaho. AT&T argues that the Commission neither ruled to include or exclude AT&T's originally proposed language relating to performance standards, and by eliminating the phrase "pattern of conduct" from Part A, Section 19.3, and failing to include AT&T's proposed language for Attachment 3, Section 18.2, AT&T's ability to police and enforce compliance with the Agreement is vitiated.

17. AT&T's argument refers to a compromise made in similar Idaho negotiations concerning performance standards which was identical to AT&T's proposed language in Montana. It states that in Montana, the Commission did not have an opportunity to consider the effects of elimination of the performance quality guidelines of Attachment 3, Section 18.2, on the "patterns of conduct" language proposed by AT&T and neither parties' briefs on the issue explored the significance of this nexus.

18. The solution reached in Idaho has no bearing on the Commission's decision for Montana. The Commission's decision was reached independently and is affirmed.

Issue A-3: Branding

19. Both parties state that this issue was not addressed by the Commission and request the Commission to decide the issue on reconsideration. Both parties briefed Issue A-3 in their supplemental briefs. The branding issue was inadvertently omitted from the Order on Supplemental Disputed Issues and we grant reconsideration on this issue.

20. AT&T proposed contract language for sections 8.3 and 8.4 which would require U S WEST to rebrand with AT&T's brand all U S WEST-branded services provided to AT&T's customers. If U S WEST could not rebrand such services, AT&T's proposed language would

require U S WEST to not only unbrand the service when offered to AT&T's customers, but to also unbrand the service when offered to U S WEST's own customers.

21. During arbitration, the issue of branding/unbranding was limited to U S WEST's provision of operator services, directory assistance, and repair and maintenance to an AT&T customer. AT&T also is concerned that U S WEST may attempt in the future to brand additional services that were not contemplated during the negotiation and arbitration of this agreement. AT&T argued that U S WEST might refuse to either rebrand such services with AT&T's brand or to remove U S WEST's brand when the service is provided to an AT&T customer.

22. AT&T also wants to reserve an option to deem rebranding/unbranding as not "practical" for a reason such as excessive cost. AT&T's proposed language would require U S WEST to unbrand its own services when AT&T concludes that rebranding is not practical and requests unbranding. AT&T also does not want to be forced to choose between paying an excessive cost for rebranding or leaving the U S WEST brand in place when rebranding may be technically feasible but inordinately expensive.

23. U S WEST argued that AT&T's language should be rejected because it goes far beyond what was ordered by the Commission and the FCC. U S WEST claims that its proposed language generally addresses rebranding/unbranding for operator services and directory assistance, clearly states that such branding is only available where "technically feasible," and requires AT&T to pay the associated costs.

24. U S WEST's language in Section 8.2 is generally consistent with the Commission's order and should be accepted, with one exception. U S WEST's proposed language includes a provision that would allow a U S WEST employee, when making contact with a customer on behalf of AT&T to make "unflattering remarks about AT&T or local service

competition" when solicited by the AT&T customer. We conclude that the phrase, "unless solicited by the AT&T customer" should be deleted.

25. For Section 8.4, the words "technically feasible" are accepted rather than AT&T's "practical." The last sentence of Section 8.4 should be deleted. The sentence states, "If AT&T requests unbranding of a service under such circumstances, U S WEST must unbrand their own services." Section 8.5 should be deleted also and related issues can be addressed as they arise.

Issue No. 3-4: Shared Transport.

26. U S WEST argues extensively for reconsideration of this issue, as it did prior to the Commission's resolution in Order No. 5961d. The Commission must follow the FCC's regulations and the FCC's Third Order on Reconsideration until and unless the Eighth Circuit's decision is overturned. U S WEST's argument, in short, is an argument to disregard controlling law, which we will not do.

Issue No. 4-1: Combined Transport of Local/Toll Traffic on Single Trunk Groups.

27. U S WEST argues that combined transport of local and toll traffic on single trunk groups violates the Act, is not necessary to interconnection or access to U S WEST's network elements, and will require U S WEST to incur additional uncompensated costs solely for AT&T's benefit.

28. The Commission concluded that AT&T had proposed safeguards which were reasonable and that U S WEST had failed to argue persuasively that it would be harmed. U S WEST argues that this decision violates the Act because it requires U S WEST to provide a superior, yet unbuilt network. We disagree. The order does not require U S WEST to build a superior network--it merely permits the existing network to be used somewhat differently than U S WEST would choose to use it.

Issue No. A-2 and Issue No. A-4: Intellectual Property Issues.

29. U S WEST requests reconsideration of intellectual property issues, contending that contrary to the Commission's finding that it is fair and more efficient to require U S WEST to negotiate sublicensing, it is unfair and inefficient to do so. U S WEST further states that the Commission cannot impose the costs of sublicensing upon U S WEST without permitting U S WEST to recover the costs from requesting carriers.

30. As U S WEST acknowledges on page 13 of its petition, the Act requires that requesting carriers compensate incumbents for the costs of providing interconnection and access to UNEs. U S WEST has the burden to demonstrate costs that should be recovered. The Commission did not rule that U S WEST cannot be permitted to recover costs of sublicensing agreements, it merely stated that such costs are more efficiently incurred if U S WEST negotiates on behalf of all CLECs. U S WEST has not presented new arguments on reconsideration.

31. U S WEST is required by law to open its networks for CLEC access to UNEs and interconnection. Obtaining sublicenses is a necessary part of doing so. The Commission's omnibus costing proceeding is the proper venue for addressing costs of sublicensing.

Issue No. 1-1: Construction and Implementation Costs.

32. Issue No. 1-1, which relates to construction and implementation costs, was omitted from the Order on Supplemental Disputed Issues. AT&T opposes inclusion of the following term:

3. Construction and Implementation Costs
 - ...
 - 3.2 U S WEST will provide unbundled Network Elements through U S WEST's existing facilities. U S WEST is not required to construct new facilities to accommodate AT&T requests for unbundled elements.

33. U S WEST argued that it has no duty to construct new facilities to accommodate AT&T's access to or requests for UNEs, even if AT&T is willing to pay for such construction. U S WEST's position here and in other dockets has been that it has no obligation to construct any facility for a requesting CLEC, although it may agree to do so if it wishes. U S WEST supports its position on this issue by referring to the Eighth Circuit's July 18, 1997 opinion which held that the 1996 Act does not require ILECs to provide their competitors with superior quality interconnection and unbundled access, even if a CLEC is willing to compensate for it.

34. AT&T argues that U S WEST's proposed language should be rejected because it is inconsistent with other contract provisions. AT&T contends that U S WEST in misinterpreting the Court's decision and trying to rely on the Court's quality of service discussion to relieve it of any construction obligations.

35. U S WEST has construction obligations under the Act. Although the Eighth Circuit vacated the FCC's rules requiring ILECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, it endorsed the FCC's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." Iowa Utils. Bd., 120 F.3d at 813, n. 33, *quoting* First Report and Order, ¶ 198. In the case of resale of services, the Commission concluded that U S WEST is obligated to construct facilities requested by AT&T when it would construct them for its own customers. This conclusion recognizes that AT&T is a customer of U S WEST and should have the same expectations regarding U S WEST's construction policies as U S WEST's end user customers.

36. This policy is also valid for U S WEST's construction obligations when a CLEC requests facilities in order to provide service through UNEs obtained from U S WEST. This

obligation, however, is limited by U S WEST's general regulatory service obligation to customers in its service territory. By purchasing UNEs from U S WEST, AT&T will become a customer of U S WEST and thus entitled to receive the same application of construction policies as U S WEST's wholesale or retail customers. U S WEST's proposed contract language for Section 3.2 is not consistent with this policy and is rejected.

CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST and AT&T are public utilities offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.
2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.
3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934*, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the Montana agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The 1996 Act permits either party to a negotiation pursuant to 47 U.S.C. § 251 to petition this Commission to arbitrate any open issues in the negotiation of an interconnection contract, according to the parameters included in 47 U.S.C. § 252(b)(1).

6. Arbitration by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(b)(4)(A) limits the Commission's consideration of a petition for arbitration to the issues set forth in the petition and the response and to imposing appropriate conditions as required to implement § 251(c) upon the parties to the agreement.

7. In resolving by arbitrating under 47 U.S.C. § 252(b) and imposing conditions upon the parties to the agreement, the Commission is required to (1) ensure that the resolution and conditions meet the requirements of § 251, including the FCC regulations prescribed pursuant to § 251; (2) establish rates for interconnection, services, or network elements according to the pricing standards in subsection (d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c). The resolution of the disputed issues in this Docket meets the requirements of 47 U.S.C. § 252(c).

8. The FCC's regulations adopted to implement § 251 of the Telecommunications Act of 1996 are binding on this Commission, except the sections relating to the pricing and the "pick and choose" rules which have been stayed by the U.S. Court of Appeals for the Eighth Circuit pending consolidated appeals.

9. The Commission properly decides all issues presented by the parties, including disputes regarding the form of the contract, the structure of the contract, and contract language.

Section 252(c) of the 1996 Act does not limit the matters that may be arbitrated by the Commission, except the express provision that requires state commissions to limit consideration to the issues identified by the parties. 47 U.S.C. § 252 does not limit the issues that the parties may request the Commission to arbitrate.

10. Where the Commission has regulatory jurisdiction, it must apply federal law as well as state law, and where Congress has preempted state law, the Federal law prevails. *See FERC v. Mississippi*, 102 S.Ct. 2126 (1982).

ORDER

THEREFORE, based on the foregoing, IT IS ORDERED

- 1) that AT&T's Motion for Reconsideration is denied;
- 2) that U S WEST's Petition for Reconsideration or, in the Alternative, for Rehearing is denied;
- 3) the issues omitted from the Supplemental Order on Disputed Issues are resolved as set forth herein; and
- 4) AT&T and U S WEST shall file their executed interconnection agreement with the Montana Public Service Commission for approval within 14 days of service of this Order.

DONE AND DATED this 3rd day of June, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.